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No. 93-1318

In the Supreme Court of the United States

OCTOBER TERM, 1993

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

TRANSCON LINES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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Respondents' basic submission in this case is that Transcon's trustee in bankruptcy has an inviolate right to enforce a credit provision in Transcon's tariff, even though the collection action violates numerous provisions of the ICC's credit regulations. In support of that claim, respondents rely principally on this Court's decision in *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990). See Br. in Opp. 10, 11-12, 20, 21. *Maislin*, however, has no applicability to this case.

Maislin involved an exercise by the ICC of its general powers under 49 U.S.C. 10701 to require a carrier's practices to be reasonable. The ICC had determined that it was an "unreasonable practice" for a carrier to collect its filed tariff rate, after it negotiated (but had failed to

file) lower rates on which a shipper reasonably relied. 497 U.S. at 121-122, 129-130. This Court held that the ICC could not find it to be an unreasonable practice for a carrier to collect the filed rate, because the statute itself requires the carrier to take that action. *Id.* at 130-131. Thus, *Maislin* rests on a holding that the carrier had not committed any statutory or regulatory violation at all in seeking to collect its rates.

In contrast, respondents here concede that they "did not comply" with the ICC's duly authorized credit regulations, which govern how and when a carrier may assess charges in addition to the freight charges that are due on delivery. Br. in Opp. 4-5. And, unlike the bankrupt carriers in *Maislin* (who directly challenged the ICC's regulatory policy), respondents do not contend that the ICC's regulations are invalid. Rather, respondents claim immunity from an injunction in this case by elevating the filed rate doctrine above all other requirements in the Act—including the Act's express prohibition of shipments on credit except as authorized by ICC regulations. 49 U.S.C. 10743(a). Respondents simply insist that because the filed rate doctrine prevailed in *Maislin* it must prevail here as well. Br. in Opp. 11. The issue presented here, however, is significantly different from the issue in *Maislin*. The issue here is whether the ICC can obtain a federal court injunction that prohibits a motor carrier and its trustee in bankruptcy from collecting charges sought *in admitted violation of the Commission's credit regulations*. *Maislin* does not address the issue of how the competing demands of the filed rate doctrine and other requirements of the Act are to be reconciled in any particular setting, because no violation of the Act was found in that case.[1]

Since *Maislin*, the Court has specifically addressed the interaction between the filed rate doctrine and other statutory claims and defenses. See *Reiter* v. *Cooper*, 113 S. Ct. 1213 (1993). *Reiter* holds that the filed rate doctrine is no obstacle to the assertion of "claims and defenses that are specifically accorded by the [Interstate Commerce Act] itself." *Id.* at 1219. Respondents seek (Br. in Opp. 12) to distinguish *Reiter* by noting that in *Reiter* the claim "accorded by the Act" was asserted by a shipper, and in this case the claim "accorded by the Act" is asserted by the ICC. Respondents further argue (Br. in Opp. 12) that *Reiter* is irrelevant here because, under *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, 456 U.S. 336 (1982), *shippers* have no right to defend

[1] Contrary to respondents' contentions, *Maislin* is inapplicable here for two other independent reasons. First, the additional charges respondents seek to impose are not a "filed rate" at all for purposes of the filed rate doctrine. Br. in Opp. 16. The only rate protected by the filed rate doctrine is the *rate due on delivery*. The additional charges sought by respondents are *defined* by reference to tariff rates (as the ICC acknowledged below), but they are nothing more than a charge for extending credit. See Pet. 16. *Maislin* has nothing to say about protecting credit terms (let alone liquidated damages claims as are made here). Second, even on the assumption that respondents' credit charges *are* a filed rate, the ICC's injunction does not require a departure from the tariff schedule entirely. The basic point of *Maislin* is that *negotiated, unfiled* rates may not be enforced at the expense of the filed rate. Here, the ICC's injunction would not limit respondents to collection of a negotiated, unfiled rate. Rather, under the ICC's injunction respondents could collect the full filed rate due upon delivery, plus interest. *Maislin* does not prelude a remedy that compels a carrier to observe one filed rate rather than another. See *Maislin*, 497 U.S. at 129 n.11; *Rebel Motor Freight, Inc.* v. *ICC*, 971 F.2d 1288, 1294 (6th Cir. 1992).

against the collection of the filed rate by invoking a violation of the credit regulations.

Respondents' effort to distinguish *Reiter* is unpersuasive. The central principle of *Reiter* is that the filed rate doctrine does not trump other statutory rights expressly conferred by the Interstate Commerce Act itself. That principle cannot logically be limited to private rights conferred upon shippers. It would be ironic indeed if the right vested in the ICC to enforce the requirements of the Act were deemed of lesser consequence than the right of shippers to avoid payment of unreasonable rates. If respondents were correct, carriers would be free to insert flagrantly unreasonable or discriminatory terms in their tariffs, and the ICC would have no ability to prevent application of those tariffs by "bring[ing] a civil action * * * to enforce [the Interstate Commerce Act] * * * or a regulation or order of the Commission * * * when violated by a [motor] carrier providing transportation subject to the jurisdiction of the Commission." 49 U.S.C. 11702(a)(5). *Reiter* makes clear that the Act is not to be frustrated by according primacy in each and every case to the filed rate doctrine.[2]

[2] Respondents suggest (Br. in Opp. 18-19) that both the ICC's power to issue credit regulations and its power to seek injunctions are "*general* requirements" of the Act that do not trump the filed rate doctrine under *Reiter*. In *Reiter*, the Court accepted that the Act's general reasonable-rate requirement does not provide a defense to a collection action based on the filed tariff, because the Court had so held in *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464 (1959). 113 S. Ct. at 1219. But the statutory credit provision is not a "general" requirement in that sense; it is a specific prohibition against release of goods by carriers without payment, unless the ICC specifically authorizes otherwise. 49 U.S.C. 10743. And the ICC's power to request an injunction is not a "requirement" of the Act at all; it is a tool for enforcing it. For purposes of the issue here, the two provisions in tandem are fully analogous to the reparations right at issue in *Reiter*.

This Court has recognized that the Commission may prevent a carrier from collecting rates that facially comply with the tariff filing requirements of the Act because the rates violate other regulatory requirements. See *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354 (1984) (upholding retroactive rejection of a tariff).

Nor are respondents assisted by noting that *Commercial Metals* gives no right to shippers to enforce the credit regulations as against the filed rate. That decision explicitly recognizes that *the ICC* has "the power to seek a federal-court injunction requiring a carrier to comply with the [credit] regulations." *Commercial Metals*, 456 U.S. at 349. Indeed, it was largely because "the ICC may regulate the credit practices of carriers even without the judicially created remedy of forfeiture of freight charges," *id.* at 350, that the Court declined to find an implied remedy in favor of shippers. While respondents would have the ICC rely on virtually any remedy other than an injunction to enforce its credit regulations against carriers that violate them, Br. in Opp. 14 & n.6, this Court concluded in *Commercial Metals* that "[t]he remedies for a carrier's violations of the regulations are best left to the ICC for such resolution as it thinks proper." 456 U.S. at 352. Respondents' argument—that they must be permitted to collect rates even though they may be subjected to civil or criminal penalties for doing so in violation of the credit regulations—has no basis in the Act or in common sense.

Respondents also suggest (Br. in Opp. 13) that *Commercial Metals*'s endorsement of the ICC's power to seek an injunction is inapplicable here, because the ICC is seeking to enforce its regulations "retroactively by

preventing the Trustee from collecting filed rate charges," and "[i]t is axiomatic that one cannot use injunctive powers to prevent conduct that has already occurred." The ICC is not seeking an injunction to prevent violations that have already occurred. Rather, the ICC is seeking to prevent the Trustee from enforcing credit terms in a manner that clearly violates the ICC's credit regulations. There is nothing "retroactive" about preventing those violations from occurring.

Respondents are seeking to enforce defective bills for additional charges that were not sent to shippers on time, and of which shippers were never given adequate notice. Br. in Opp. 4. They are also seeking to collect on aggregate freight bills, rather than individual ones, *id.* at 4-5, when the economies of scale realized by that procedure negate the purpose of allowing credit-collection charges in the first place. Pet. 16 n.10. The collection of the additional credit charges in direct violation of the ICC's regulations constitutes an ongoing violation of governing requirements, and the requested injunction would restrain precisely that conduct. It would not, however, preclude respondents from collecting the tariff charges due and assessed at the time of shipment, plus interest for any payments that were not timely made.

In the end, respondents' contentions are irreconcilable with the principles of *Commercial Metals* and *Reiter*. We submit that, as a direct application of those precedents, this Court can and should summarily hold that the ICC is empowered to seek a federal court injunction to enforce its credit regulations, notwithstanding the filed rate doctrine. But if *Maislin* casts any doubt on that proposition, this Court's plenary review is warranted to clarify the scope of the ICC's enforcement powers in this context.

* * * * *

For the foregoing reasons, as well as those stated in our petition, the petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be summarily reversed on the authority of *Reiter v. Cooper*, *supra*, and *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, *supra*. Alternatively, the Court should grant the petition and set this case for argument.

Respectfully submitted.

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